(2)

Supreme Court, U.S.
FILED
JUN 28 1999
CLERK

NO. 98-1910

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COMMONWEALTH OF PENNSYLVANIA

VS.

WILLIAM ALLEN - RESPONDENT

MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in *forma pauperis*.

[x] Petitioner has previously been granted leave to proceed in *forma pauperis* in the following court(s):

All Pennsylvania Courts

[ ] Petitioner has not previously been granted leave to proceed in *forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

William Allen
(Signature)

29 pp

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

I, William Allen, am the respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes____ No 4

   a. If the answer is yes, state the amount of your salary or wages per month and given the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. 1985 200.00 MONTH

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes____ No X

3. Do you own any cash or have a checking or savings account? Yes____ No X

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No X

   a. If the answer is yes, state the total value of the items owned.

5. List the persons who are dependent upon you for support and state your relationship to those persons. 0

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 23, 1999.

William Allen
(Signature)

NO. 98-1910

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COMMONWEALTH OF PENNSYLVANIA

V.

WILLIAM ALLEN,
Respondent

BRIEF IN OPPOSITION TO THE COMMONWEALTH OF PENNSYLVANIA'S PETITION FOR A WRIT OF CERTIORARI

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June, 1999

QUESTIONS PRESENTED

1. Should the Petition for Writ of Certiorari be denied because the state court's judgment rests on adequate and independent state grounds, namely Article I, Section 8 of the Pennsylvania Constitution?

2. Should the Petition for Writ of Certiorari be denied because the Pennsylvania Supreme Court's judgment correctly interpreted and applied the jurisprudence of this Court?

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STATEMENT OF JURISDICTION

This Court is without jurisdiction to hear the case at bar because the decision of the Pennsylvania Supreme Court rests upon adequate and independent state grounds, namely, Article I, Section 8 of the Pennsylvania Constitution. In addition, the Pennsylvania Supreme Court properly analyzed and applied the rulings of this Court in issuing a decision that is legally correct and consistent with Federal law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Fourth and Fourteenth Amendments of the United States Constitution, set forth in the Commonwealth of Pennsylvania's Petition for Writ of Certiorari, this case involves Article 1, Section 8 of the Pennsylvania Constitution, and Rule 323(h) of the Pennsylvania Rules of Criminal Procedure, 18 Pa. C.S.

Article I, Section 8 of the Pennsylvania Constitution provides:

> **Security from searches and seizures**
> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Rule 323 of the Pennsylvania Rules of Criminal Procedure, which governs the procedure for motions to suppress evidence and hearings on such motions, states in pertinent part:

> (h) The Commonwealth shall have the burden of going forward with the evidence and of

> establishing that the challenged evidence was not obtained in violation of the defendant's rights. . . .

STATEMENT OF THE CASE

Petitioner, the Commonwealth of Pennsylvania, seeks certiorari by mischaracterizing the Pennsylvania Supreme Court's decision in this case, claiming that the Court held that a tip of a man with a gun "is not material" or "significant" to the question of whether a Terry stop is permitted. This misreading by the petitioner is inaccurate and misleading and does not warrant review by this Court.

While recognizing that this Court in Terry v. Ohio, had already factored the "armed and dangerous" component into the reasonable suspicion equation, the Pennsylvania Supreme Court considered the totality of the circumstances, including the nature of the tip and the information contained therein. The fact that the subject of the tip was alleged to be carrying a gun (where no gun was seen or seized) is merely another allegation and it supplies no reliability or basis of knowledge where there was none before.

Under the totality of the circumstances, the Court ruled that the illegal detention and seizure of evidence was conducted without reasonable suspicion as it was based on an unsubstantiated and uncorroborated tip, for which the source, veracity, reliability and basis were never established.

Respondent, William Allen was arrested and charged with violations of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act. Respondent moved to suppress the physical evidence (alleged crack cocaine) seized from him in violation of his federal and state constitutional rights. At the motion to suppress hearing, Police Officer Kyle Bey testified that he spoke to Mr. Grixbie Stephens at the 22nd District Police Station (App. 3-4).[1] Mr. Stephens conveyed information that he had allegedly received from an unnamed senior citizen that a heavyset, middle aged man named "Mookie" was known to sell drugs and have a gun at 2128 North Natrona Street in Philadelphia. No clothing description was provided, the source of Mr. Stephens' information was not disclosed, and the factual basis for concluding that "Mookie" was selling drugs and carried a gun was not given. Officer Bey stated he associated the name and description with respondent because of some undescribed prior contact (App. 3-4).

Based on the above, Officer Bey went to 2128 North Natrona with Mr. Stephens. Respondent was observed on the sidewalk sitting in a chair neutrally between the house located at 2128 North Natrona Street and an abandoned property, with his arms folded across his chest, head down, eyes closed, and an undescribed "bulge" in his pants pocket (App. 3). Officer Bey ordered respondent to stand up, turn around, walk to a wall 5 feet away, spread his feet, and place his hands on the wall. Respondent complied with the order. Officer Bey then placed one foot between

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[1] App. refers to the Appendix to Petitioner's Writ.

appellant's feet which were spread apart and straddled petitioner with his other foot. At this point, Officer Bey had not yet observed anything unusual or suspicious about appellant or his behavior. After appellant was secured, Officer Bey noticed a clear baggie with numerous clear packets inside the flared front pocket of appellant's sweatshirt (App. 3). Appellant was handcuffed and searched. Two bags of drugs were seized along with money (App. 3).

Judge Levan Gordon of the Philadelphia Court of Common Pleas granted the motion and suppressed the evidence seized holding, *inter alia*, that the information supplied to the officer was "skeletal as to the specifics about dates, times and the consistency of this alleged drug activity" and that there was no "independent corroboration" by the officer (App. 37).

Following an appeal from the suppression order by the prosecution, a divided panel of the Superior Court of Pennsylvania (App. 17-30) reversed the suppression order. The Supreme Court of Pennsylvania granted discretionary review and, on February 26, 1999, reversed the Superior Court and reinstated the original suppression order. The Pennsylvania Supreme Court accepted the suppression judge's findings, and agreed with his reasoning (App. 7-11), ruling that, after considering the totality of circumstances, the baselessness and unreliability of the tip, failed to rise to the level of specific and articulable reasonable suspicion, and the resultant seizure violated both the Pennsylvania Constitution and the Federal Constitution (App. 7-11).

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT'S DECISION RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court should deny the Petition for Writ of Certiorari because the Pennsylvania Supreme Court's judgment rests upon adequate and independent state grounds which undermine the jurisdiction of this Court. Michigan v. Long, 463 U.S. 104 (1983); Herb v. Pitcairn, 324 U.S. 117, 126 (1945). In Michigan v. Long, this Court held that it will not review a state court judgment when it is clear from the state court's opinion that the judgment rests upon adequate and independent state grounds. A clear, adequate and independent state ground exists in this case in the form of Article I, Section 8 of the Pennsylvania Constitution.

In Michigan v. Long, the state court had cited the Michigan Constitution in the course of its opinion, but this Court held that the passing references were not sufficient to establish an adequate and independent state ground. This Court noted that the state court had only twice cited its state constitution, but had cited no state cases to support the conclusion that the search was unconstitutional on the state ground. Moreover, the state court had relied exclusively upon an interpretation of Supreme Court and federal cases. Under these circumstances, it appeared to this Court that the Michigan court felt compelled to reach the result it did because of its interpretation of federal law.

That plainly is not the case here. Although reaching the same result under both the state and federal constitutions, the

Pennsylvania Supreme Court's decision in this case does not suggest in any way that its consideration of the state constitution was secondary to, contingent upon, or compelled by its understanding of federal law.

In holding that an unsubstantiated and uncorroborated tip, for which the source, veracity, reliability and basis of knowledge were never established, did not supply sufficient information to raise a reasonable suspicion that petitioner was engaged in criminal activity, the Pennsylvania Supreme Court specifically referred to the state constitution as well as state cases, stating:

> The Fourth Amendment to the United States Constitution, and Article 1, Section 8 of the Pennsylvania State Constitution require that police officers have within their knowledge "specific and articulable facts" raising a reasonable suspicion that criminal activity is afoot before they conduct an investigatory stop of an individual. See, e.g., Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226, 228-29 (1996) (discussing federal and state constitutional constraints on police investigatory stops recognized in Terry v. Ohio, 391 U.S. 1, 88 S.Ct. 1868 (1968), and Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969)). We find that, considering the totality of the circumstances, Officer Bey did not have within his knowledge "specific and articulable facts" raising a reasonable suspicion that appellant was currently engaged or about to engage in criminal activity at the time of his investigatory stop. Because the physical evidence seized from appellant's person was obtained by contravening his rights under the Fourth Amendment to the Federal Constitution and Article 1, Section 8 of the Pennsylvania State Constitution, we reverse the Superior Court's order reversing the trial court's suppression of the physical evidence.

More importantly, the Pennsylvania Supreme Court based its holding on Commonwealth v. Hawkins, 547 Pa. 652, 692 A.2d 1068

(1997), a case decided solely under the Pennsylvania Constitution.

In it's petition to this Court the Commonwealth of Pennsylvania is ostensibly requesting that this Court overrule Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) or in the alternative, create an exception to Terry where a tip to police involves a man possessing a gun.

These issues have already been considered and decided adversely to the Commonwealth by the Pennsylvania Supreme Court in Commonwealth v. Hawkins, supra, which clearly, unequivocally and expressly did so on independent state grounds. Again, in deciding the case the Commonwealth now seeks to bring before this Court, the Pennsylvania Supreme Court relied heavily on Hawkins.

In the Hawkins case, the Court was requested to determine whether a police radio broadcast that a man of a particular description is carrying a gun may serve as the justification for a search of that person and the seizure of the gun he is carrying when the arresting officer is unable to authenticate the telephone message on which the radio broadcast was based or provide an independent basis for the stop and frisk. In holding that it did not, the Court specifically cited the Pennsylvania constitutional provision at issue, quoting it in its entirety, referring to it many times, and noting how and why the Pennsylvania Constitution should be interpreted differently from the federal constitution, as it explained how the Commonwealth's theory ran afoul of the expansive rights embodied in the state constitution:

> Commonwealth v. Melendez, 544 Pa. 323, 676 A.2d 226, 230 (1996) makes it clear that the

> requirements of Terry are also the requirements of **Art. I, §8 of the Pennsylvania Constitution**, and we decide the present case on the basis of **Art. I, §8 of the Pennsylvania Constitution**, which provides:
>
> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

547 Pa. at 656 n.2.

The Court went on to reject in no uncertain terms the Commonwealth's theory of a "man with a gun exception" stating:

> The fact that the subject of the call was alleged to be carrying a gun, of course, is merely another allegation, and it supplies no reliability where there was none before. And since there is no gun exception to the Terry requirement for reasonable suspicion of criminal activity, in the typical anonymous caller situation, the police will need an independent basis to establish the requisite reasonable suspicion.
>
> The Commonwealth takes the radical position that police have a duty to stop and frisk when they receive information from any source that a suspect has a gun. Since it is not illegal to carry a licensed gun in Pennsylvania, it is difficult to see where this shocking idea originates, notwithstanding the Commonwealth's fanciful and histrionic references to maniacs who may spray schoolyards with gunfire and assassins of public figures who may otherwise go undetected. **Even if the Constitution of Pennsylvania would permit such invasive police activity as the Commonwealth proposes -- which it does not** -- such activity seems more likely to endanger than to protect the public. Unnecessary police intervention, by definition, produces the possibility of conflict where none need exist.

547 Pa. at 657.[2]

In summing up, as to make no mistake as to what the basis of it's ruling was, the Court stated:

> Contrary to the Commonwealth's view, the public will receive its full measure of protection by police who act within the **restraints imposed on them by Art. I, §8 of the Constitution of Pennsylvania** and this court's relevant caselaw. Upon receiving unverified information that a certain person is engaged in illegal activity, the police may always observe the suspect and conduct their own investigation. If police surveillance

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[2] On the basis of Article I, §8 of the Pennsylvania Constitution, the Pennsylvania Supreme Court has steadfastly resisted any efforts to broaden the narrow scope of Terry. In Commonwealth v. Rodriquez, 532 Pa. 62, 614 A.2d 1378 (1992), this Court noted:

> We emphatically reject the Superior Court's "ends justify the means" analysis. By focusing its attention only upon the serious ills inflicted upon society by illegal narcotics, the Superior Court failed to recognize and respond to necessary constitutional constraints on excessive police conduct. The seriousness of the criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime, can never be used as justification for ignoring or abandoning the constitutional right of every individual in this Commonwealth to be free from intrusions upon his or her personal liberty absent probable cause.
>
> Accordingly, we decline to adopt the rationale of the Superior Court or the arguments offered by the Commonwealth, and thus, we decline to expand the appropriately narrow "reasonable suspicion" exception to probable cause already established by the United States Supreme Court in Terry v. Ohio, and by this Court in Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969).

Id. at 1383.

> produces a reasonable suspicion of criminal conduct, the suspect may, of course, be briefly stopped and questioned (the Terry investigative stop), and, if the officer has reasonable fear for his safety, police may pat down the suspect's outer garments for weapons.

547 pa. at 657-8.[3]

Article I, §8 of the Pennsylvania Constitution both predates the Fourth Amendment to the federal Constitution and, the Pennsylvania Supreme Court has consistently held, that it confers greater rights than its federal counterpart, particularly in the area of individual rights to privacy. As the Pennsylvania Supreme Court has noted, the state-based "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment." Commonwealth v. Sell, 504 Pa. 46, 63, 470 A.2d 457, 466 (1983).

The State Supreme Court found that the Pennsylvania provision "is meant to embody a strong notion of privacy, carefully guarded in this Commonwealth for the past two centuries":

> As we stated in Sell: "the survival of the language now employed in Article I, §8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth. [Citations omitted.]

Commonwealth v. Edmunds, 526 Pa. 374, 394, 586 A.2d 887, 897 (1991).

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[3] While Hawkins is a plurality decision, the principles of Hawkins were later reaffirmed by the full court in Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571 (1997).

Although the texts of Article I, §8 and the Fourth Amendment are similar, "the protections afforded by the two constitutions are not identical." Commonwealth v. Mason, 535 Pa. 560, 569, 637 A.2d 251, 256 (1993); accord Edmunds, 526 Pa. at 391, 586 A.2d at 895-896 (although Article I, §8 and Fourth Amendment similar, court not "bound to interpret" them identically). The federal and state provisions serve diverging purposes which have, in turn, given rise to a distinction in the scope of the exclusionary rule in its federal and state applications.

Any suggestion that the Pennsylvania Supreme Court felt bound by federal constitutional law to render a decision in this case which it would not otherwise have rendered is belied by a host of recent Pennsylvania decisional law explicating Article 1, Section 8: its distinct analytical differences from the Fourth Amendment, and the broader protections provided to citizens by it, including Commonwealth v. Labron, 547 Pa. 344, 690 A.2d 228 (1997) which rejected New York v. Belton, 453 U.S. 454 (1981), and held, after a summary reversal by this Court,[4] that as a matter of state

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[4] Labron, along with two other cases raising the same issue, Commonwealth v. Kilgore, 544 Pa. 439, 677 A. 2d 311 (1995) and Commonwealth v. White, 543 Pa. 45, 669 A. 2d 896 (1995), were originally decided adversely to the Commonwealth by the Pennsylvania Supreme Court in 1995. White was clearly decided on State Constitutional grounds. The Labron and Kilgore opinions were somewhat ambiguous and the Commonwealth filed Petitions for Writ of Certiorari with this Court seeking review. In Pennsylvania v. Labron, 518 U.S. 938 , 116 S.Ct. 2485, 135 L.Ed. 2d 1031 (1996), this Court summarily reversed Labron and Kilgore, remanding those cases back to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court reaffirmed its decision in Labron, at Commonwealth v. Labron, 547 Pa. 344, 690 A. 2d 228 (1997), clearly indicating that its decision was based on the Pennsylvania Constitution, which

(continued...)

constitutional law the "automobile exception" requires both probable cause and exigent circumstances to justify a warrantless search. See also Commonwealth v. Matos, 672 A.2d 769 (1996) (rejecting California v. Hodari. D., 499 U.S. 621 (1991), under Article I, Section 8); Commonwealth v. Mason, 535 Pa. 560, 637 A.2d 251 (1993) (refusing to apply under Article I, Section 8, the "inevitable discovery doctrine" as applied in Segura v. United States, 468 U.S. 796 (1984); Commonwealth v. Martin, 534 Pa. 136, 626 A.2d 556 (1993) (dog sniff, deemed not to be a search under federal law, held to be a search requiring probable cause under Article I, Section 8); Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) (rejecting United States v. Leon, 468 U.S. 897 (1984), refusing to find a "good faith exception" to the exclusionary rule in Pennsylvania, and determining that Pennsylvania's exclusionary rule is constitutionally mandated, not supervisory); Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979) (declining to follow United States v. Miller, 425 U.S. 435 (1976), under Article I, Section 8).

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[4](...continued)
claim White's counsel had preserved in the courts below and argued in the Pennsylvania Supreme Court.

As counsel for Kilgore had not properly preserved the State Constitutional issue, the Pennsylvania Supreme Court entered and order affirming the Pennsylvania Superior Court's original order denying relief, Commonwealth v. Kilgore, 437 Pa. Super. 491, 650 A. 2d 462 (1994), affirming Kilgore's conviction and sentence, Commonwealth v. Kilgore, 547 Pa. 346, 690 A. 2d 229 (1997). This was not, however, the end of the story for Mr. Kilgore. In Commonwealth v. Kilgore, 719 A. 2d 754 (Pa. Super. 1998), the Court ordered suppression and a new trial. holding that Kilgore's attorney had been ineffective in failing to preserve the State Constitutional issue.

As described and interpreted by the Pennsylvania Supreme Court, Article I, Section 8 gives stronger recognition to the privacy interests of Pennsylvania's citizens; those privacy interests weigh more heavily in the balance against the needs of law enforcement than is the case under the Fourth Amendment. In Commonwealth v. Mason, 435 Pa. at 571 n.3, 637 A.2d at 251 n.3, Justice Flaherty wrote for the Pennsylvania Supreme Court:

> Upon reflection, it is apparent that in the context of the Fourth Amendment, when a court deters police misconduct, it necessarily also safeguards privacy and the probable cause requirement. Why would a court deter police misconduct at all if not to deter police from improperly invading the right of persons to be secure, i.e., private, in their persons, houses, papers, and effects? Deterring police misconduct is not an end in itself. The ultimate distinction, then, between the federal and the Pennsylvania analysis is not that the federal courts seek only to deter police misconduct and the Pennsylvania courts seek to protect certain rights, but that the federal courts place less importance than do we on the right of privacy. Therefor, they balance the interests differently and reach a different conclusion as to the relative importance of privacy as against securing criminal convictions. (emphasis added).

From all of the above, it is clear that Pennsylvania's references to the State Constitution in the case at bar reflect an adequate and independent state ground for the Pennsylvania Supreme Court's decision. As interpreted and applied by Pennsylvania's high court, Article I, Section 8 is both separate and independent from federal law. In the context of search and seizure claims generally, and in the context of the reasonable suspicion standard in stop and frisk cases in particular, the state's reliance upon

Article I, Section 8 reflects a distinct basis for relief that is different from its federal counterpart. It would thus be unfair and inaccurate to conclude that the Pennsylvania Supreme Court "decided the case the way it did because it believed that federal law required it do so." Michigan v. Long, 463 U.S. at 1041. Rather, Pennsylvania's decisional law and Article I, Section 8 were recognized to provide an independent basis for concluding that Article I, Section 8 had been violated by the search in this case.

This Court stated in Herb v. Pitcairn, and reiterated in Michigan v. Long, that

> The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected our views of federal laws, our review could amount to nothing more than an advisory opinion."

Michigan v. Long, 463 U.S. at 1042 (quoting Herb v. Pitcairn, 324 U.S. at 126). See also, Commonwealth v. Labron, 547 Pa. 344, 690 A.2d 228 (1997) where the state court reaffirms its original judgment on independent state constitutional grounds after this Court reversed and remanded after ruling that there was no violation of the Fourth Amendment to the United States Constitution. That is precisely the situation here. An adequate and independent state ground exists, and this Court should deny the Petition for Writ of Certiorari.

II. THIS COURT SHOULD ALSO DENY THE PETITION FOR WRIT OF CERTIORARI AS THE PENNSYLVANIA SUPREME COURT'S JUDGMENT CORRECTLY INTERPRETED AND APPLIED THE JURISPRUDENCE OF THIS COURT.

This Court should deny the Commonwealth's Petition as the Pennsylvania Supreme Court contrary to petitioner's suggestion, never misinterpreted, misread or misapplied the caselaw by this Court dealing with the reasonable suspicion standard in the stop and frisk context.

Respondent was subjected to a constitutionally impermissible detention and seizure when police awoke him, as he was sleeping in a chair and ordered him to assume the classic arrest position against a wall, so that they could conduct an exploratory search.

This police action was viewed by the Pennsylvania Supreme Court as an illegal detention and seizure of evidence conducted without reasonable suspicion, since it was based on an unsubstantiated and uncorroborated anonymous tip, for which the source, veracity, reliability and basis were never established.

Petitioner seeks to change the focus of the Pennsylvania Supreme Court's holding in another attempt to bang it's "man with a gun exception to Terry v. Ohio" drum, which was unconditionally silenced by the Pennsylvania Supreme Court in Commonwealth v. Hawkins, supra.

This case is not a "man with a gun" case, as no weapon was ever seen or seized. The suppressed evidence in fact turned out to be a controlled substance. Rather, what this case is about is the

reliability of the tip, the basis of knowledge of the tipster, and the lack of justification presented for a stop and frisk.

The Federal law is well established that a police officer may, in appropriate circumstances, stop a person for the purpose of investigating possible criminal behavior, even though there is no probable cause for an arrest, as long as the officer has reasonable suspicion that the person is engaged in criminal activity. See Terry v. Ohio, 392 U.S. 1, 19-23, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). The circumstances may even require a frisk of the person to determine whether the person is carrying a weapon, if the police officer has a reasonable suspicion that the person is armed and poses a threat to the officer or others. See id. at 27. However, when the police act on the information of an informant, the reliability of that information must be established before a citizen can be stopped and frisked.

This Court has consistently rejected the position that a tip from an unknown source can alone justify a detention unless a reliable basis for the tip is shown or an independent investigation corroborates the reliability of that information. In Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031 (1971), this Court held that it is the prosecution's burden to establish the underlying basis for a radio call if it intends to use its contents to provide support for an arrest. At issue there was the lawfulness of an arrest based on a radio bulletin alleging that two persons of specific description were wanted for breaking and entering a business establishment. The officer who issued the bulletin had obtained an

arrest warrant. However, the arrest warrant was not properly based upon probable cause.

The Court rejected the claim that the arresting police were entitled to rely upon the radio bulletin, if the officer issuing the bulletin lacked probable cause. The Court wrote:

> We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

91 S.Ct. at 1037.

The Whiteley rule was extended to cover investigatory stops in United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675 (1985), where this court held that a stop and frisk may be supported by an otherwise anonymous police radio bulletin only if evidence is offered at the suppression hearing to establish that the police officer who issued the radio bulletin had a basis for concluding that there was a reasonable suspicion that the individual described or named was involved in criminal activity and was armed and dangerous. The Court wrote:

> Assuming the police make a Terry stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop, United States v. Robinson, [536 F.2d 1298 (1976)],

> and if the stop that in fact occurred was not significantly more intrusive than would have been permitted the issuing department.

United States v. Hensley, 469 U.S. at 233, 105 S.Ct. at 682.

In Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983), this Court recognized that anonymous tips were inherently unreliable. In that case, however, this Court found that the subsequent investigation by the police, which corroborated the informant's predictions of the suspect's future behavior, was so extensive as to provide the reliability otherwise lacking.

In Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412 (1990) this Court continued to proclaim the inherent unreliability of unverified anonymous tips:

> ... the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown and unknowable' ... the anonymous tip ... provides virtually nothing from which one might conclude that (the caller) is either honest or his information reliable.

110 S.Ct. at 2415.

The Court continued:

> [A]s we said in Adams [v. Williams, 407 U.S. 143 (1972)]: 'Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.' 407 U.S., at 147, 92 S.Ct. at 1924. Simply put, a tip such as this one, standing alone, would not 'warrant a man of reasonable caution in the belief' that [a stop] was appropriate.'

Alabama v. White, supra, 110 S.Ct. at 2416. Nevertheless, the majority in White found that sufficient corroboration of the tip may overcome the unreliability. There, because the informant was

able to accurately predict the future behavior of the suspect (i.e., when she would leave her apartment, the type of car she would enter, and the destination to which she would drive), the majority concluded that, "although it is a close case," the investigatory stop was justified. Id., 110 S.Ct. at 2417.

Unlike the circumstances in White, the tip here contained no information as to what respondent was doing, where he was coming from, where he was going, how long he had been there, how the individual "knew" he was armed - he wasn't - or anything at all to show the informant had some intimate knowledge of the actions of the man. Absent any prediction of future behavior, the arresting officers were left only with a general description including a nickname and a location, and the Pennsylvania Supreme Court held that this was not enough under either the Pennsylvania Constitution or, relying on White; Gates; and Terry,[5] the United States

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[5] Petitioner's myopic proposition that the Pennsylvania Supreme Court's holding that a tip that a man has a gun "is not material" (petitioner's brief p. 3) or "significant" (petitioner's brief p. 5) to the question of whether a Terry stop is permitted is inaccurate, and misleading for many reasons. First, it must be remembered that this Court in Terry v. Ohio, supra had already factored the "armed and dangerous" component into the reasonable suspicion equation, when it carved out a limited exception to the probable cause requirement.

Secondly, the Court considered, as it must under Terry, Illinois v. Gates, and Alabama v. White, the totality of the circumstances including the nature of the tip and the information contained therein.

Thirdly, the Court in relying on Commonwealth v. Hawkins, supra correctly reasoned that the fact that the subject of the tip was alleged to be carrying a gun is merely another allegation and it supplies no reliability or basis of knowledge where there was none before.

Constitution:

> Having reviewed the testimony provided at the suppression hearing, the trial court's Findings of Fact and Conclusions of Law, and the Superior Court's opinion reversing the suppression of the drugs found on appellant, we conclude that at the time of the initial Terry stop, Officer Bey did not possess sufficient information to raise a reasonable suspicion that appellant was currently engaged in criminal activity. Officer Bey offered no indication in his testimony at the suppression hearing that Stephens had given him any information concerning when appellant was alleged to have sold drugs at 2128 North Natrona Street, or with what regularity and frequency he was selling drugs there. In addition, Officer Bey's testimony fails to establish whether or not Stephens told him the specific basis of the knowledge concerning the drug activity. The trial court found that Stephens told Bey that he received his information concerning the drug dealing at 2128 North Natrona Street from a senior citizen for whom he provided services. Bey's testimony provides no indication that Stephens told him how the senior citizen who gave him his information knew that "Mookie" had been selling drugs and carrying a gun at 2128 North Natrona Street. Therefore, the trial court correctly concluded that Officer Bey was unaware of the specific basis of knowledge of the senior citizen who gave the information concerning "Mookie" to Stephens. The skeletal information provided to Officer Bey by Stephens, combined with the mere fact that appellant was sitting, apparently asleep, outside of 2128 North Natrona Street upon Bey's arrival, simply fails to support the Superior Court's conclusion that Officer Bey had a reasonable suspicion that appellant was currently engaged in criminal activity at that time.

725 A.2d at 741-742.

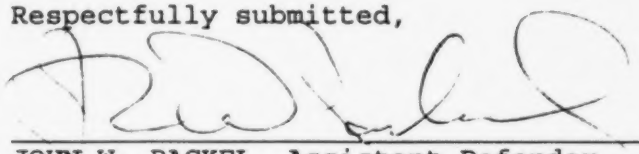
In ruling that the illegal detention and seizure of evidence was conducted without reasonable suspicion as it was based on an unsubstantiated and uncorroborated tip, for which the source,

veracity, reliability and basis were never established, the Pennsylvania Supreme Court properly analyzed and applied the leading cases of this Court on the subject, while issuing a decision that is legally correct and consistent with Federal law.

CONCLUSION

For the foregoing reasons, petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,



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